

**ORIGINAL****RECEIVED**

JUN 16 2003

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )

Reexamination of the Comparative Standard )  
For Noncommercial Educational Applicants )

MM Docket 95-31

TO: The Commission

**PETITION FOR RECONSIDERATION**

Black Hawk College ("Black Hawk"), by its attorneys and pursuant to Section 1.429 of the Commission's rules, hereby seeks reconsideration of certain aspects of the Commission's Second Report and Order (the "*Order*") in the above-referenced rulemaking proceeding. Black Hawk is the licensee of noncommercial television broadcast station WQPT, Moline, Illinois, the PBS affiliate for the Quad Cities market (Davenport, Iowa-Rock Island-Moline, Illinois). Black Hawk also is an applicant for a construction permit for a new noncommercial television station on channel 30 at Davenport, Iowa.

In the *Order*, the Commission resolved to return as unacceptable for filing any application for construction permit submitted during an open filing window by a noncommercial applicant, proposing a noncommercial station, that is mutually exclusive with any application filed by a commercial applicant for the allotment. *Order* at paras. 21-22. The Commission further determined that any currently pending application for a noncommercial educational station that is mutually exclusive with an application(s) for a commercial station will be returned as unacceptable for filing, regardless of how long the noncommercial application has been pending. *Order* at para. 41. The Commission's decision to apply the new rule to pending applicants such as Black Hawk, whose Davenport, Iowa application has been pending for several

Noted for rec'd 07/11  
10/1/03

years, violates the principles established in *Ashbucker*, is impermissibly retroactive and is arbitrary and capricious.

**I. Background.**

Black Hawk's application for a new noncommercial television station on channel 30 at Davenport, Iowa (File No. BPET-19960710LA) is mutually exclusive with the application of Jack I. Gartner ("Gartner") for a commercial television station on channel 30 at Davenport (File No. BPET-19961001KU).<sup>1</sup> Black Hawk and Gartner have entered into a settlement agreement whereby Black Hawk agreed to dismiss its application in return for payment of \$950,000 by Gartner to Black Hawk. *See Joint Request for Approval of Settlement Agreement* filed November 30, 2001 (the "Settlement Agreement"). Pursuant to the Settlement Agreement, the parties requested that the Commission approve the agreement, dismiss Black Hawk's application and grant Gartner's application. The parties further requested that the Commission withhold public notice of the grants and dismissal until notified that Gartner has placed the settlement payment into escrow (a procedure similar to the Commission's actions approving settlements in many of the RKO cases several years ago -- e.g., *RKO General, Inc.*, 4 FCC Rcd 5747 (1989)). As of the date hereof, the Commission has not yet acted on this Settlement Agreement and both Black Hawk's and Gartner's applications remain pending.<sup>2</sup>

Unless the Commission approves the pending Settlement Agreement and Gartner completes his obligations pursuant to that agreement, the Commission's decision in the present rulemaking proceeding will result in the dismissal of Black Hawk's application with prejudice,

---

<sup>1</sup> A copy of this Petition for Reconsideration is being sent to Gartner's attorney.

<sup>2</sup> Black Hawk's and Gartner's applications also were mutually exclusive with an application of Iowa Public Broadcasting Board ("IPBB") for channel 30 at Davenport, Iowa (File No. 19960508KF). Black Hawk reached a settlement agreement with IPBB pursuant to which IPBB's application was dismissed. This settlement has been consummated and IPBB is no longer an applicant for channel 30 at Davenport.

despite Black Hawk's good faith filing and years-long prosecution of the application under the Commission's rules in effect at the time of its filing (1996!) until adoption of the *Order*. This dismissal will occur regardless of (i) Black Hawk's willingness to elect to propose a commercial station, as would be Black Hawk's option if filing its application in a future filing window; and (ii) Black Hawk's pending Settlement Agreement. Nor is Black Hawk able to avail itself of the opportunity to request that the channel 30 allocation for Davenport, Iowa be reserved for noncommercial use. *Order* at para. 41. This harsh retroactive effect of the Commission's decision unfairly penalizes Black Hawk.

## **II. The Commission's Decision Violates the Principles of *Ashbacker*.**

The Commission must use the same set of procedures to process the applications of all similarly situated persons who come before it seeking the same license. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). Black Hawk and Gartner are similarly situated applicants for a new television broadcast station on channel 30 at Davenport, Iowa. Both timely filed applications, both have fully prosecuted their applications and both have entered into a Settlement Agreement that is currently pending before the Commission. Clearly, the Commission's new procedure of automatically dismissing only a noncommercial applicant's long-pending application solely because it is a noncommercial applicant does not treat similarly situated applicants equally. Indeed, the Commission's decision treats Black Hawk and Gartner entirely dissimilarly, with one applicant (Gartner) granted the authority to proceed solely because of his good fortune to be a commercial applicant, while the other applicant (Black Hawk) is deprived of its long-held plans. The Commission's decision effectively deprives Black Hawk of the opportunity to propose a commercial station and pursue its application through the auction process if it so chooses -- a choice which the Commission has provided to all future

noncommercial applicants for commercial allotments – while allowing Gartner to escape the auction process altogether. Accordingly, the Commission’s decision violates *Ashbacker* and cannot stand.

### **III. The Commission’s Decision is Impermissibly Retroactive.**

Establishing rules with retroactive effects is not always prohibited. For example, a new property tax or zoning regulation can upset the reasonable expectations that prompted those affected by the new regulation to acquire the property; and an agency rule can have a retroactive effect where public safety or health are involved. However, the rules the Commission adopted in this proceeding are not within the scope of permissible retroactive applicability. These rules impose the ultimate penalty – dismissal of Black Hawk’s application – for no public interest reason other than ease of processing the remaining commercial applications.

It is well settled that any change in an agency’s rules may have legal consequences only for the future -- i.e., rulemaking proceedings cannot attach new legal consequences to events completed before a rule’s enactment. *See Landgraf v. USI Film Products*, 511 U.S. 244, 269 (1994) (stating that a rule is impermissibly retroactive if it impairs rights a party possessed when he acted). Obviously an order dismissing a fully accepted application solely on the basis of an applicant’s choice made long ago impairs that party’s rights with respect to its already accepted application. Because the Commission’s decision unreasonably changes the future legal consequences (automatic dismissal versus continued processing or an opportunity to seek continued processing) of Black Hawk’s past actions (filing of its application as a noncommercial applicant), the *Order* is impermissibly retroactive.

Furthermore, the Commission’s decision to dismiss applications such as Black Hawk’s is not allowable as a permissible midstream change to its license allocation procedures. *See, e.g.,*

*Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987) (approving the Commission's change to processing by lottery of an application submitted when comparative hearings were the Commission's means of choosing among competing applicants). In the present case the Commission is not just changing its license allocation procedure mid-stream, but is also dismissing as unacceptable for filing previously accepted applications without allowing such applicants an opportunity to prosecute their pending applications under the new procedures. Therefore, the Commission is not simply changing the licensing procedures for Black Hawk's application mid-stream, but is completely extinguishing Black Hawk's status as an applicant without further opportunity to prosecute its pending application under the new rules.

Moreover, the Commission had a way of making the change in its license processing rules permissible. It could have provided Black Hawk the opportunity (1) to elect to participate in an auction as a commercial entity or (2) to seek to convert channel 30 at Davenport to a reserved, noncommercial channel for which only noncommercial applicants are eligible. As the Commission has acknowledged, there are only approximately twenty groups remaining with noncommercial and commercial applicants. *Order* at para. 41. Allowing the few noncommercial applicants in those groups the limited right to elect to propose commercial stations would not create a significant effect on the Commission's new procedures or unduly delay the initiation of new service. By not allowing Black Hawk either option and dismissing Black Hawk's application, the Commission's decision has an impermissibly retroactive effect on Black Hawk.

#### **IV. The Commission's Decision is Arbitrary and Capricious.**

In the *Order* the Commission concluded that new noncommercial applicants must make non-reversible choices when they file their applications as to whether they are proposing

commercial or noncommercial operations. That is not unreasonable, because under the new rules a noncommercial applicant also has an opportunity to seek to have the channel reserved for noncommercial use; and the noncommercial entity knows it has a non-reversible choice when it files its application. However, Black Hawk had neither opportunity.

With respect to the Commission's determination to dismiss applications such as Black Hawk's without allowing an opportunity to reserve the channel for which it has applied, the Commission stated:

[F]urther review of the channels associated with the pending applications would cause even greater delay in our licensing process and the introduction of broadcast service, and also would cause greater unfairness to applicants for commercial stations, because all interested parties have spent the time and money necessary to complete all of the engineering and legal components of a long-form application.

*Order* at para. 41.

The Commission then states it will "move the process forward by subjecting any remaining mutually exclusive applications to auction." *Id.* The Commission believes "this approach will end the administrative delay . . . and result in licensing new broadcast facilities to serve the public more quickly." *Id.* However, nowhere in the *Order* does the Commission explain why it will not allow Black Hawk and other similarly situated applicants a limited opportunity to specify commercial stations in order to participate in auctions. Such a limited opportunity to change filing status would not have to delay auctions to bring new service to the public.

All pending applicants have spent time and money on their applications, including noncommercial applicants. By not allowing noncommercial applicants an opportunity to change status, the Commission unfairly penalizes them for a decision made years ago under rules changed only by this *Order*. The Commission is obligated to provide a reasoned explanation for

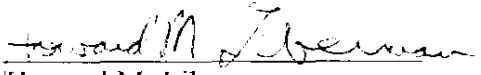
its failure to consider this alternative and its failure to do so renders the *Order* arbitrary and capricious.

**V. Conclusion.**

For the foregoing reasons, Black Hawk respectfully urges the Commission to reconsider its decision in this proceeding that it will automatically dismiss pending applications for noncommercial stations which are mutually exclusive with pending applications for commercial stations. Black Hawk requests that the Commission modify its decision and allow such noncommercial applicants the opportunity to prosecute their applications under the newly adopted procedures.

Respectfully submitted,

**BLACK HAWK COLLEGE**

By:   
Howard M. Liberman  
Elizabeth A. Hammond  
DRINKER BIDDLE & REATH LLP  
1500 K Street, NW  
Suite 1100  
Washington, D.C. 20005  
(202) 842-8800

Its Attorneys

June 16, 2003

**CERTIFICATE OF SERVICE**

I, Nellie Martinez-Redicks, a secretary at the law firm of Drinker Biddle & Reath LLP, hereby certify that a copy of the foregoing Petition for Reconsideration was served by U.S. mail, postage prepaid this 16<sup>th</sup> day of June, 2003, on:

Aaron Shainis  
Shainis & Peltzman, Chartered  
1850 M Street, NW  
Suite 240  
Washington, DC 20036

  
Nellie Martinez-Redicks